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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 132.

ANTOINE G. STARR, AN INFANT, BY HIS GUARDIAN, A. PEARCE TOMKINS, PLAINTIFF IN ERROR,

vs.

SAMUEL W. CAMPBELL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

FILED OCTOBER 15, 1906.

(20,420.)

(20,420.)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 7, 1907.



1 United States Circuit Court for the Western District of Wisconsin.

ANTOINE G. STARR, an Infant, by A. PEARCE TOMKINS, His Guardian, Plaintiff,

vs.

SAMUEL W. CAMPBELL, Defendant.

W. M. Tomkins, attorney for plaintiff.
William G. Wheeler, attorney for defendant.

2 UNITED STATES OF AMERICA,
Western District of Wisconsin:

At a stated term of the Circuit Court of the United States for the Western District of Wisconsin, begun and held at the city of Superior, in said district, on the third Tuesday, being the 19th day of June, 1906, present and presiding, the Honorable Arthur L. Sanborn, United States District Judge, the following proceedings, among others, were had, to-wit:

2½ Circuit Court of the United States, Western District of Wisconsin.

ANTOINE G. STARR, an Infant, by A. PEARCE TOMKINS, His Guardian, Plaintiff,

vs.

SAMUEL W. CAMPBELL, Defendant.

Precipe.

The Clerk of said Court will please issue a Summons in the action above entitled, *complaint served.*

W. M. TOMKINS,
Plaintiff's Attorney.

[Endorsed:] Law Docket C, No. 148. United States Circuit Court, Western District of Wisconsin. Antoine G. Starr, an infant by A. Pearce Tomkins, his guardian, Plaintiff, *vs.* Samuel W. Campbell, Defendant. Precipe. Filed June 19, 1906. F. W. Oakley, Clerk. Filed ——, 18—. W. M. Tomkins, Plaintiff's Attorney.

3 UNITED STATES OF AMERICA,
Western District of Wisconsin, ss:

Circuit Court, —— Term, A. D. 1906.

ANTOINE G. STARR, an Infant, by A. PEARCE TOMKINS, His Guardian, Plaintiff,
vs.
SAMUEL W. CAMPBELL, Defendant.

In ——.

I enter plaintiff's security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this Court; and in default of payment by the Plaintiff of any costs ordered or adjudged to be paid by him hereby agree and stipulate that execution may issue against my property for all costs not exceeding two hundred dollars taxed against plaintiff.

Dated this 19th day of June A. D. 1906.

W. M. TOMKINS,
Residence, Ashland, Wis.

[Endorsed:] No. 148 Law C. Circuit Court United States, Western District Wisconsin. Antoine G. Starr, an infant by A. Pearce Tomkins, his guardian, Plaintiff, *vs.* Samuel W. Campbell, Defendant. Bond for Costs. Filed June 19, 1906. F. W. Oakley, Clerk.

On the same day a summons was issued out of said Clerk's office against said defendant, in the words and figures following, to-wit:

4 Circuit Court of the United States for the Western District of Wisconsin.

ANTOINE G. STARR, an Infant, by A. PEARCE TOMKINS, His Guardian,
vs.
SAMUEL W. CAMPBELL.

The President of the United States of America to said Defendant:

You are hereby summoned to appear within twenty days after service of this summons, exclusive of the day of service, and defend the above entitled action in the Court aforesaid; and in case of your failure so to do, judgment will be rendered against you according to the demand of the complaint, which has been filed in the office of the Clerk of this Court, at Madison, Wisconsin.

And you are also required to file your answer in said action in the office of the Clerk of this Court, at the City of Madison, within the time above specified.

The Marshal of said District is hereby commanded to serve this summons, and make due return thereto.

Witness, the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at the City of Madison, in the said Western District of Wisconsin, this 19 day of June in the year of our Lord one thousand nine hundred and six and of the Independence of the United States the one hundred and thirtieth.

F. W. OAKLEY, *Clerk.*

W. M. TOMKINS,
Plaintiff's Attorney.
P. O. Address, Ashland, Wis.

[Endorsed:] Law Docket 148 C. Antoine G. Starr, an infant, by A. P. Tomkins, his guardian, *vs.* S. W. Campbell. Summons and Complaint. Service of the within summons is admitted this 19th day of June, 1906. William G. Wheeler, Attorney for S. W. Campbell. Filed June 19, 1906. F. W. Oakley, Clerk.

On the same day the plaintiff duly filed his complaint in the words and figures following to-wit:

5 United States Circuit Court, Western District of Wisconsin.

ANTOINE G. STARR, an Infant, by A. PEARCE TOMKINS, His Guardian, Plaintiff,
vs.
SAMUEL W. CAMPBELL, Defendant.

The plaintiff complaining of the defendant alleges:

1. That the plaintiff is an infant, under the age of twenty-one years.

2. That on the 5th day of September, 1905, at Ashland, in the county of Ashland, State of Wisconsin, upon application duly made on his behalf, the said A. Pearce Tomkins was, by an order of Hon. James McCully, County Judge for said Ashland County, in which county said infant then resided and now resides, duly appointed guardian of the plaintiff, for the purposes of this action, and that he is also the general guardian of the property and estate of said infant.

3. That on October 1, 1901, the said Antoine G. Starr was a Chippewa Indian of the Lake Superior, residing upon the Bad River Indian Reservation in the State of Wisconsin, born within the jurisdiction of the United States of America, and on that day the President of the United States of America, in accordance with the provisions of the third article of a treaty concluded September 30th, 1854, with the Chippewa Indians of the Lake Superior and the Mississippi, approved the selection of said Antoine G. Starr, and assigned the same to him, being the West half of the Southeast quarter of section four (4) Township forty-six (46), North of Range three (3), west of the fourth principal meridian in the State of Wisconsin, and that the third article of said treaty was in words and figures as follows:

6 "Article three. The United States will define the boundaries of the reserved tracts, whenever it may be necessary, by actual survey, and the President may, from time to time, at his discretion, cause the whole to be surveyed, and may assign to each head of a family, or a single person over twenty-one years of age, eighty acres of land for his or their separate use; and he may, at his discretion, as fast as the occupants become capable of transacting their own affairs, issue patents therefor to such occupants, with such restrictions of the power of alienation as he may see fit to impose. And he may also at his discretion, make rules and regulations respecting the disposition of the lands in case of the death of the head of a family or single person occupying the same, or in case of its abandonment by them. And he may also assign other lands in exchange for mineral lands, if any such are found in the tracts herein set apart. And he may also make such changes in the boundaries of such reserved tracts or otherwise as shall be necessary to prevent interference with any vested rights. All necessary roads, highways and railroads, the lines of which may run through any of the reserved tracts, shall have the right of way through the same, compensation being made therefor as in other cases."

By act of Congress approved Feb'y 11th, 1901, the right to allotments was extended to all Indians then residing on the La Pointe or Bad River Reservation, in Wisconsin, irrespective of age and condition.

4. That pursuant to such selection and allotment, and on the 29th day of June, A. D. 1905, the President, by virtue of the power and authority conferred upon him by said treaty, issued and delivered to said Antoine G. Starr, a patent to said land, a true copy of which patent is hereto attached, marked Exhibit "A" and made a part of this complaint. That said land exclusive of the merchantable timber standing thereon was then and now is of the value of $1000.00 and no more.

7 5. That on the 8th day of January, A. D. 1902, the said Antoine G. Starr signed his name to a certain written instrument, called a contract, a copy of which is hereto attached, marked Exhibit "B," and made a part of this complaint.

That in December 1902, the President made an order amending rule 7 set out in said contract by adding thereto as follows:

"If the Indian Agent shall in any case be of the opinion that the allottee is not competent to manage his own affairs, he shall, subject to the approval of the Commissioner of Indian Affairs, have authority to fix the sum or sums, if any, such allottee shall be permitted to withdraw from deposit."

6. That between the 27th day of January 1902 and the 1st day of October 1905, and prior to the commencement of this action, the said Justus S. Stearns, named in said contract entered upon said land and cut and removed therefrom a large amount of standing timber of the value of at least Fifteen Thousand ($15,000.00) Dollars, which amount was prior to the commencement of this action paid to the said defendant, S. W. Campbell, for the use and benefit of this plaintiff, that of said amount said Campbell has paid to said

plaintiff the sum of Three Thousand One Hundred ($3100.00) Dollars and no more, and there is still in the said Campbell's possession the sum of Eleven Thousand Nine Hundred ($11900.00) Dollars so received by him for this plaintiff.

7. That on the 4th day of October 1905, and prior to the commencement of this action, the said A. Pearce Tomkins, as general guardian of the plaintiff, demanded of said defendant the sum of Eleven Thousand Nine Hundred ($11900.00) Dollars, and requested said defendant to pay the same in cash, or to deposit the same in some National Bank, and countersign a check for said amount in favor of the plaintiff, but defendant then and there refused, and still does refuse, so to do, and announces that he will only pay to the plaintiff or his guardian the sum of Ten dol-
8 lars per month, and claims the right to hold the said money and pay the same out as he may be directed to by the Commissioner of Indian Affairs.

8. That prior to the making of the order amending said rule number 7, it was and for many years had been the established custom and practice of the respective Indian Agents of the said La Pointe Indian Agency, to pay to the allottees under such timber contracts, the amounts payable under such contracts as fast as demanded by such allottees such payments being left entirely to said Indian Agents, the Commissioner of Indian Affairs in no manner interfering with, or attempting to control such payments, and that it was the said S. W. Campbell, who was appointed as such agent in July, A. D. 1898, who first adopted the rule and practice of limiting such payments to ten dollars per month, as he in his discretion thought best.

9. That the said S. W. Campbell, gives as his reason for refusing to pay said money or countersign a check for the same, that he has received instructions from the Commissioner of Indian Affairs not to allow allottees to draw more than Ten Dollars per month, under such contracts, unless otherwise directed by said Commissioner, while this plaintiff alleges that it does not fall within the scope of the authority of the Commissioner of Indian Affairs to interfere with the disposal of said money by the said Indian Agent, and no order given by said Commissioner can justify said Indian Agent in his refusal to pay said money to this plaintiff, or to countersign a check in his favor therefor, but that said general guardian so appointed under the laws of the State of Wisconsin is the proper party to determine how much shall be paid to and expended for this plaintiff.

10. That by reason of said failure and refusal of the said defendant to pay said money or to countersign a check therefor in favor of this plaintiff, the plaintiff is damaged in the sum of Eleven Thousand Nine Hundred ($11900) Dollars.

9 Wherefore the plaintiff demands judgment against the said defendant for the sum of Eleven Thousand Nine Hundred ($11900.00) dollars damages with interest from October 4, 1905, together with the costs of this action.

W. M. TOMKINS,
Attorney for Plaintiff.

10 Ex. "A."

4–454.

General Land Office Number 276.

The United States of America to all to whom these presents shall come, Greeting:

Whereas, There has been deposited in the General Land Office of the United States an order bearing date January 6, 1902, from the Secretary of the Interior, accompanied by a schedule with return dated September 27, 1901, from the office of Indian Affairs, containing a list of selections of land for certain Indians of the Bad River Reservation, as contemplated by the Treaty concluded September 30, 1854, with the Chippewa Indians of Lake Superior and the Mississippi, whereby it appears that on the first day of October, 1901, the president, in accordance with the provisions of the third article of said Treaty, approved the selection of Antoine G. Starr, being the West half of the Southwest quarter of section four (4) Township forty-six (46), North of Range three (3) West, according to the Official Plat of the survey of said lands returned to the General Land Office by the Surveyor-General.

Now, know ye, That the United States of America, in consideration of the premises, and in conformity with the said Treaty, the order and return, with schedule aforesaid, have given and granted and by these presents, do give and grant, unto the said Antoine G. Starr, and to his heirs, the said tract above described; but with the stipulation that said Antoine G. Starr, and his heirs shall not sell, lease, or in any manner alienate said Tract without the consent of the President of the United States; to have and to hold the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature thereunto belonging unto the

11 said Antoine G. Starr, and to his heirs forever, provided, as aforesaid, that Antoine G. Starr, and his heirs shall not sell, lease, or in any manner alienate, said tract without the Consent of the President of the United States of America.

In testimony whereof, I, Theodore Roosevelt, President of the United States of America, have caused these letters to be made Patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the City of Washington, the twenty-ninth day of June, in the year of our Lord one thousand nine hundred and five, and of the Independence of the United States the one hundred and twenty-ninth.

By the President:

T. ROOSEVELT.

By the Secretary:

F. M. McKEAN.

C. H. BRUSH,
Recorder of the General Land Office.

Recorded, Wisconsin, Vol. 380, Page 318.
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12 EXHIBIT "B."

Contract Between Bad River Indian, and Justus S. Stearns.

This Agreement, made and entered into at the La Pointe Agency, Wisconsin, this eighth day of January, 1902, between Antoine G. Starr, an Indian of the Bad River Reservation, party of the first part, and Justus S. Stearns, of Ludington, Michigan, party of the second part—

Witnesseth, That the said party of the first part agrees to sell to the party of the second part, under rules and regulations approved by the President of the United States, December 6, 1893, which are hereto attached and made a part of this contract, the merchantable timber of the kinds hereinafter specified, standing or fallen on the said Bad River Reservation, within the following described limits, viz:

W. ½ of the S. E. ¼, of Section four (4) Township forty-six (46) Range 3 West, the same being lands which have been allotted and conveyed by patent from the United States to the party of the first part under the provisions of the treaty of September 30, 1854.

The party of the second part agrees to cut and remove the said timber within the above described limits, and agrees to employ Indian labor in the cutting and removal of said timber, in preference to other labor on equal terms, whenever suitable Indian labor can be obtained.

13 For and in consideration of the foregoing, the said party of the second part also agrees to pay to the United States Indian Agent for the La Pointe Agency, in trust for said party of the first part, for all such timber cut upon the said described lands at the following rates, viz: 65 cents per thousand feet for shingle timber; $2.00 per thousand feet for merchantable dead pine; $5.00 per thousand feet for merchantable green white pine; $3.50 per thousand feet for green Norway pine; $1.00 per thousand feet for green or sound hemlock; $2.00 per thousand feet for merchantable basswood; $2.00 per thousand — for merchantable elm; $2.00 per thousand feet for merchantable maple; $2.00 per thousand feet for merchantable birch, and $4.00 per thousand feet for merchantable oak, according to the scale that shall be made by a competent scaler selected for that purpose by the mutual agreement of the parties thereto, whose selection shall be approved by the agent of the La Pointe Indian Agency, and full payment of said timber to be made before it is removed from the land hereinbefore described, and the title to the logs shall not vest in the party of the second part until full payment shall have been made therefor.

And, further, said party of the second part also agrees to pay to said Indian Agent as aforesaid the sum of Fifty dollars on the signing and delivery of this contract, and after its approval by the Commissioner of Indian Affairs, and to pay annually, beginning one year from the date of this contract, until such timber is cut and removed from said land, a sum equal to five per centum of the contract

price of said timber upon an estimate to be made by some competent estimator to be agreed upon between said second parties and the Indian agent of such agency, such payments to apply on such purchase price and to be deducted from the price of the timber when cut and removed as aforesaid.

It is hereby understood and agreed that the cost of scaling shall be equally divided between the parties of the first and second part.

14 It is further agreed that said timber shall be cut and removed from said land as soon as practicable after the date of this contract, reference being had to other similar contracts held or to be held by said second party, and to the condition of the timber on said described tract, so that no depreciation in value or waste may accrue to said first party by delay in cutting, provided that the terms of this contract shall not extend beyond the period of fifteen years from the date hereof.

It is further understood and agreed by the party of the second part that this agreement is void and of no effect unless approved by the Commissioner of Indian Affairs.

That the party of the second part is firmly bound for the faithful compliance with the stipulations of this contract by and under the bond made and executed by Justus S. Stearns, as principal, and the City Trust, Safe Deposit and Surety Company of Philadelphia, as surety, entered into the 2nd day of January, 1895, and now on file in the office of the Commissioner of Indian Affairs.

ANTOINE G. STARR, [SEAL.]
Party of the First Part.
JUSTUS S. STEARNS. [SEAL.]

In presence of
R. U. BAUGHMAN.
E. B. HILL.

15 Attached to said contract is the following modification and approval:

For value received and in consideration of the approval by the Commissioner of Indian Affairs, as hereby modified, of the annexed original contract between Antoine G. Starr, an Indian of the Bad River Reservation, party of the first part, and Justus S. Stearns, party of the second part; the undersigned, said Justus S. Stearns, hereby agrees to pay to the United States Indian Agent at the La Pointe Indian Agency, in trust for said party of the first part for all timber cut on the lands therein described, the following rates, viz:

All	Merchantable	White Pine	$8.00	per	thousand
"	"	Norway	8.00	"	"
"	"	Hemlock	1.50	"	"
"	"	Elm	2.00	"	"
"	"	Bass	4.00	"	"
"	"	Birch	3.50	"	"
"	"	Oak	6.00	"	"
"	"	Maple	3.00	"	"

These prices to cover all the merchantable timber on the land, whether green, dead, down or burnt, existing in each and every log of the different varieties named.

And said Justus S. Stearns hereby ratified and adopts said original contract as hereby modified and agrees that the same shall be in every particular and in all its terms be binding and in force against him, with the modification as to the schedule of prices by this supplemental agreement fixed and determined.

JUSTUS S. STEARNS. [SEAL.]

In presence of—
KATE F. WHITEHEAD.

DEPARTMENT OF THE INTERIOR.
OFFICE OF INDIAN AFFAIRS, *May* 23, 1903.

The within contract is hereby approved, subject to the regulations approved by the President, Dec. 29, 1902, as herein modified.

M. C. TONNER,
Acting Commissioner.

16 *Rules and Regulations Approved by the President December 6, 1893, under which the Prefixed Certificate is Made.*

1. The Indians of the La Pointe (or Bad River) Reservation, in the State of Wisconsin, to whom allotments have been made and patents therefor issued, as shown by a schedule hereto appended, are hereby authorized to sell on stumpage all the timber standing or fallen on their respective allotments to Justus S. Stearns, of Ludington, Michigan, under the supervision of the United States Indian Agent for the La Pointe Agency; provided that said Justus S. Stearns shall establish a mill on the reservation for the manufacture of said timber into lumber and shingles, and shall give bond in a sufficient sum to be fixed by the Commissioner of Indian Affairs, subject to the approval of the Secretary of the Interior, conditioned for the faithful observation of all the laws of the United States now in force, or that may hereafter be enacted, relative to trade and intercourse with the Indian, and the regulations prescribed or that may be prescribed thereunder; for the purchase of the timber from such of the Indian allottees as desire to sell the same and will enter into contract therefor, at not less than the following prices per thousand feet, viz:

Shingle timber, sixty-five (65) cents per thousand.
Merchantable dead pine, two (2) dollars per thousand.
Merchantable green white pine, four (4) dollars per —.
Green Norway pine, two (2) dollars per thousand.
Green or sound hemlock, one (1) dollar per thousand.
Merchantable Basswood, two (2) dollars per thousand.
Merchantable elm, two (2) dollars per thousand.
Merchantable maple, two (2) dollars per thousand.
Merchantable Birch, two (2) Dollars per thousand.
Merchantable oak, four (4) dollars per thousand.

2. Before any timber shall be cut under the foregoing authority from any allotted tract, a contract shall be entered into between the said Justus S. Stearns and the Indian to whom such allotted tract has been patented, in such form as shall be prescribed by the Commissioner of Indian Affairs, which contract, however, shall
17 not be of force until the Commissioner of Indian Affairs shall have endorsed his approval thereon, which approval shall operate as specific consent of the Executive to the sale of the timber to which the contract relates.

3. The Indian Agent for the La Pointe Agency, Wisconsin, shall see that the said Justus S. Stearns shall employ Indians in the cutting, moving and manufacturing of timber when practicable, on the same terms as other labor, and said Justus S. Stearns shall agree to employ Indians who may be willing to work in doing the logging authorized hereby.

4. The Indian Agent shall be authorized for and on behalf of the Indians of the La Pointe (or Bad River) Reservation to enter into contracts from time to time with said Justus S. Stearns for the sale on stumpage of the dead and down timber on the unallotted lands of said reservation, which contract shall specify by legal subdivisions the portion of the reservation authorized to be cut over thereunder, and shall be approved by the Commissioner of Indian Affairs in like manner as is provided for the approval of the contracts of individual Indians for the sale of timber on the allotted lands; but no contract made in pursuance of this regulation shall be construed as authorizing the sale or removal of any timber heretofore cut under any authority or pretended authority of any contract, where such timber is in litigation in any of the courts or before any of the Executive Departments.

5. No green or growing timber shall be cut or removed from the unallotted lands of the reservation, and any violation of this provision by said Justus S. Stearns will subject him to liability to prosecution and punishment under section 5388 of the Revised Statutes as amended by Act of June 4, 1888. (25 Stats. 166) as well as forcible removal from the reservation, and suit on his bond, and shall work also as a forfeiture of all contract for timber, on the
18 reservation and rights under such contracts.

6. One half of the cost of scaling shall be paid by said Justus S. Stearns, and the other half shall be paid from the proceeds of the sale of the timber.

7. After deducting one half of the cost of the scaling and other necessary expenses chargeable against the same, the proceeds of timber sold from the unallotted portions of the reservation shall be paid to the Indian Agent, to be expended for the relief and benefit of the Indians of the Reservation under the direction of the Commissioner of Indian Affairs, and the proceeds of timber taken from the allotted lands of the reservation shall, after the deductions above stated, be deposited in some national bank subject to check of the Indian owner of the Allotment, countersigned by the Indian agent of the La Pointe Agency, unless otherwise stipulated in contracts with particular Indians.

8. The farmer in charge of the reservation shall, under the direction of the Agent, be required to supervise the logging on the reservation under these regulations, to the end that no injustice is done the Indians, and no green or growing timber is cut and removed except in accordance with these regulations, and all moneys for stumpage shall be paid to him or the Agent, in trust for the Indians or Indian owner, to be by him deposited or accounted for according to the foregoing regulations, unless otherwise stipulated in the contract with such Indian owner.

18½ [Endorsed:] 148. State of Wisconsin, U. S. Circuit Court, Western District. Antoine G. Starr, by A. P. Tomkins, his guardian, plaintiff, vs. S. W. Campbell, defendant. Complaint. Filed June 19, 1906. F. W. Oakley, clerk.

19 United States Circuit Court, Western District of Wisconsin.

ANTOINE G. STARR, an Infant, by A. P. TOMKINS, His Guardian, Plaintiff,

—.

S. W. CAMPBELL, Defendant.

And now comes the above named defendant by William G. Wheeler and Henry H. Morgan, his attorneys, and demurs to the complaint in the above entitled action, for the reason that it appears upon the face thereof, that said complaint does not state facts sufficient to constitute a cause of action against this defendant.

WILLIAM G. WHEELER,
HENRY H. MORGAN,
United States Attorneys for Defendant.

19½ [Endorsed:] 148, Law C. United States Circuit Court, Western District of Wisconsin. Antoine G. Starr, an infant, by A. P. Tomkins, his guardian, plaintiff, *vs.* S. W. Campbell, defendant. Demurrer. Filed June 19, 1906. F. W. Oakley, clerk.

20 United States Circuit Court, Western District of Wisconsin.

ANTOINE G. STARR, an Infant, by His Guardian, A. PEARCE TOMKINS, Plaintiff,

vs.

SAMUEL W. CAMPBELL, Defendant.

The treaty with the Chippewa Indians of Lake Superior and the Mississippi, of September 30, 1854, contains the following provision: The President may, from time to time, at his discretion, cause the whole to be surveyed, and may assign to each head of a family or single person over twenty-one years of age eighty acres of land for his or their separate use; and he may, at his discretion, as fast as the occupants become capable of transacting their own affairs, issue

patents therefore to such occupants, with such restrictions of the power of alienation as he may see fit to impose. And he may also, at his discretion, make rules and regulations respecting the disposition of the lands in case of the death of the head of a family or single person occupying the same, or in case of its abandonment by them. And he may also assign other lands in exchange for mineral lands, if any such are found in the tracts herein set apart.

By virtue of this provision the President has made rules and regulations concerning the alienation or sale of the standing timber upon the tracts mentioned in the complaint, and from such sale the moneys claimed by the plaintiff were derived. In view of the power given to the President by the treaty, and the execution of such
21 power by him through such rules and regulations, I think that the money claimed by the plaintiff is within the control of the Interior Department, and is held in trust by the United States for the plaintiff's benefit; and that the demurrer interposed to the complaint should be sustained.

Dated June 19th, 1906.

A. L. SANBORN, *Judge.*

21½ [Endorsed:] No. 148. In the United States Circuit Court, Western District of Wisconsin. Antoine G. Starr, an infant, by his guardian, A. Pearce Tomkins, plaintiff, *vs.* Samuel W. Campbell, defendant. Order sustaining demurrer. Filed June 19, 1906. F. W. Oakley, clerk.

22 In United States Circuit Court, Western District of Wisconsin.

ANTOINE G. STARR, an Infant, by His Guardian, A. PEARCE TOMKINS, Plaintiff,

vs.

SAMUEL W. CAMPBELL, Defendant.

This cause being heard this day upon the demurrer of the defendant to the complaint of the plaintiff *and* was argued by counsel and the court being fully advised in the premises, is of the opinion and does therefore order that said demurrer be, and the same is hereby sustained, to which ruling of the court said plaintiff, by his counsel, excepts.

And thereupon, the plaintiff not asking to plead farther, but declining so to do, it is considered by the court that the plaintiff take nothing by his suit, but that the defendants go hence without day and recover from the plaintiff *their* costs herein expended.

Dated June 19th, 1906.

By the Court:

A. L. SANBORN, *Judge.*

22½ [Endorsed:] No. 148. In the United States Circuit Court, Western District of Wisconsin. Antoine G. Starr, an infant, by his guardian, A. Pearce Tomkins, plaintiff, *vs.* Samuel W. Campbell, defendant. Judgment. Filed June 19, 1906. F. W. Oakley, clerk.

On the same day, the plaintiff made and filed an assignment of error-, being as follows:

23 The Circuit Court of the United States for the Western District of Wisconsin. At Law.

ANTOINE G. STARR, an Infant, by His Guardian, A. PEARCE TOMKINS, Plaintiff,
vs.
SAMUEL W. CAMPBELL, Defendant.

Assignment of Errors.

The plaintiff in this action, in connection with his petition for a writ of error, makes the following assignment of errors which he avers occurred upon the trial of the cause, to-wit:

1. The court erred in sustaining the defendant's demurrer to the plaintiff's complaint herein.

2. The court erred in entering judgment in favor of the defendant and against the plaintiff.

W. M. TOMKINS,
Attorney for Plaintiff.

Filed Sept. 26, 1906.
F. W. OAKLEY, *Clerk.*

On the same day the plaintiff filed his prayer for a writ of error herein, as follows:

24 The Circuit Court of the United States for the Western District of Wisconsin. At Law.

ANTOINE G. STARR, an Infant, by A. PEARCE TOMKINS, His Guardian, Plaintiff,
vs.
SAMUEL W. CAMPBELL, Defendant.

Petition for Writ of Error.

And now comes Antoine G. Starr, an infant, by A. Pearce Tomkins, his guardian, plaintiff herein, and says that on or about the 19th day of June, A. D. 1906, this court entered judgment herein in favor of the defendant and against this plaintiff, in which judgment and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore this plaintiff prays that a writ of error may issue in this behalf to the United States Supreme Court, for the correction of errors so complained of, and that a transcript of the record, pro-

ceedings, and papers in this cause, duly authenticated, may be sent to the said Supreme Court of the United States.

W. M. TOMKINS,
Attorney for Plaintiff.

Filed Sept. 26, 1906.
F. W. OAKLEY, *Clerk.*

On the same day the court made its order allowing the said writ of error, in the words and figures following, to-wit:

25 Circuit Court of the United States for the Western District of Wisconsin. At Law.

ANTOINE G. STARR, an Infant, by A. PEARCE TOMKINS, His Guardian, Plaintiff,
vs.
SAMUEL W. CAMPBELL, Defendant.

Order Allowing Writ of Error.

This 25th day of Sept. A. D. 1906, came the plaintiff by his attorney, filed herein and presented to the court his petition, praying for the allowance of a writ of error intended to be urged by him, praying also, that a transcript of the record, proceedings and papers upon which the judgement herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the court does allow the writ of error upon the plaintiff giving bond according to law, in the sum of Five Hundred Dollars, which shall operate as a supersedeas bond.

A. L. SANBORN, *Judge.*

Filed Sept. 26, 1906.
F. W. OAKLEY, *Clerk.*

That on the same day in compliance with the foregoing order a writ of order was filed with the Clerk of said Court, which is as follows, to-wit:

26 *Writ of Error.*

THE UNITED STATES OF AMERICA:

The President of the United States to the Honorable Judge of the Circuit Court of the United States for the Western District of Wisconsin, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment, of a plea which is in the said circuit court, before you or some of you, between Antoine G. Starr, an infant, by his guardian, A. Pearce Tomkins, plaintiff, and Samuel W. Campbell,

defendant, a manifest error hath happened, to the great damage of the said plaintiff, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme court of the United States, together with this writ, so that you have the same at Washington, on the 25th day of Oct. next, in the said Supreme Court of the United States, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 25th day of Sept., in the year of our Lord one thousand nine hundred and six, and of the Independence of the United States the one hundred and thirty-first.

[Seal U. S. Circuit Court, Western District of Wisconsin.]

(Signed) ALFRED HARRISON,
Clerk of the United States Circuit —
for the Western District of Wisc.

The foregoing writ is hereby allowed.

(Signed) A. L. SANBORN, *Judge.*

[Endorsed:] Filed Sep. 26 1906 F. W. Oakley, Clerk.

27 WESTERN DISTRICT OF WISCONSIN, *ss:*

In obedience to the within writ, I herewith transmit to the United States Supreme Court a true and complete transcript of the record and proceedings in the foregoing entitled clause, this 4th day of October, 1906.

[Seal U. S. District Court, Western Dist. of Wisconsin, Madison.]

F. W. OAKLEY,
Clerk of the Circuit Court of the United States,
for the Western District of Wisconsin.

Copy deposited for the defendant in error in the office of the Clerk of the Circuit Court of the United States, for the Western District of Wisconsin.

Filed Sept. 26, 1906.

F. W. OAKLEY, *Clerk.*

Afterwards, on the same day, there was filed in the office of the Clerk of said Court, a bond on said writ of error, which is as follows:

28 The Circuit Court of the United States for the Western District of Wisconsin.

ANTOINE G. STARR, an Infant, by A. PEARCE TOMKINS, His Guardian, Plaintiff,
vs.
SAMUEL W. CAMPBELL, Defendant.

Bond on Writ of Error.

Know all men by these presents, that we, Antoine G. Starr, an infant, by his guardian, A. Pearce Tomkins, as principal, and Peter Lamal and William Kellogg, as sureties, are held and firmly bound unto the defendant, Samuel W. Campbell, in the full and just sum of Five Hundred Dollars to be paid to the said defendant, Samuel W. Campbell, his certain attorneys, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents. Sealed with our seals, and dated this 25th day of Sept., in the year of our Lord one thousand nine hundred and six.

Whereas, lately at a circuit court of the United States for the Western District of Wisconsin, in a suit depending in said court, between Antoine G. Starr, an infant, by A. Pearce Tomkins, his guardian, plaintiff, and Samuel W. Campbell, defendant, a judgment was rendered against the said plaintiff, and the said plaintiff having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Samuel W. Campbell,
29 citing and admonishing him to be and appear at a session of the Supreme Court of the United States, to be holden at the city of Washington, on the eight- day of October, A. D. 1906.

Now, the condition of the above obligation is such, that if the said plaintiff shall prosecute said writ of error to effect and answer all damages and costs if he fail to make the said plea good, then the above obligation to be void, else to remain in full force and virtue.

A. PEARCE TOMKINS. [SEAL.]
PETER LAMAL. [SEAL.]
WILLIAM KELLOGG. [SEAL.]

Sealed in presence of—
W. M. TOMKINS.
JOHN GARVIN.

Approved by
A. L. SANBORN,
Circuit Judge.

[Endorsed:] Filed Sep. 26 1906 F. W. Oakley, Clerk.

30 Circuit Court of the United States for the Western District of Wisconsin.

I, F. W. Oakley, Clerk of said Circuit Court, do hereby certify and return to the United States Supreme Court, that the foregoing consisting of thirty one pages numbered consecutively from one to thirty-one inclusive, is a true and correct transcript of the process, pleadings, orders, final judgment, and all other proceedings in said clause, and of the whole thereof, as appears from the original record and files of said court, except that the same contains the original bond, writ of error and citation, together with proof of service thereof. In witness whereof, I have hereunto set my hand and affixed the *seal* of said court, at Madison, in said District, this 4th day of October, 1906.

[Seal U. S. District Court, Western Dist. of Wisconsin, Madison.]

F. W. OAKLEY, *Clerk.*

31 UNITED STATES OF AMERICA, *ss:*

To Samuel W. Campbell, Greeting:

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States, to be holden in the city of Washington, on the eight- day of October, nineteen hundred and six, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States, for the Western District of Wisconsin, wherein Antoine G. Starr, an infant, by A. Pearce Tomkins, his guardian, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

A. L. SANBORN, *Judge.*

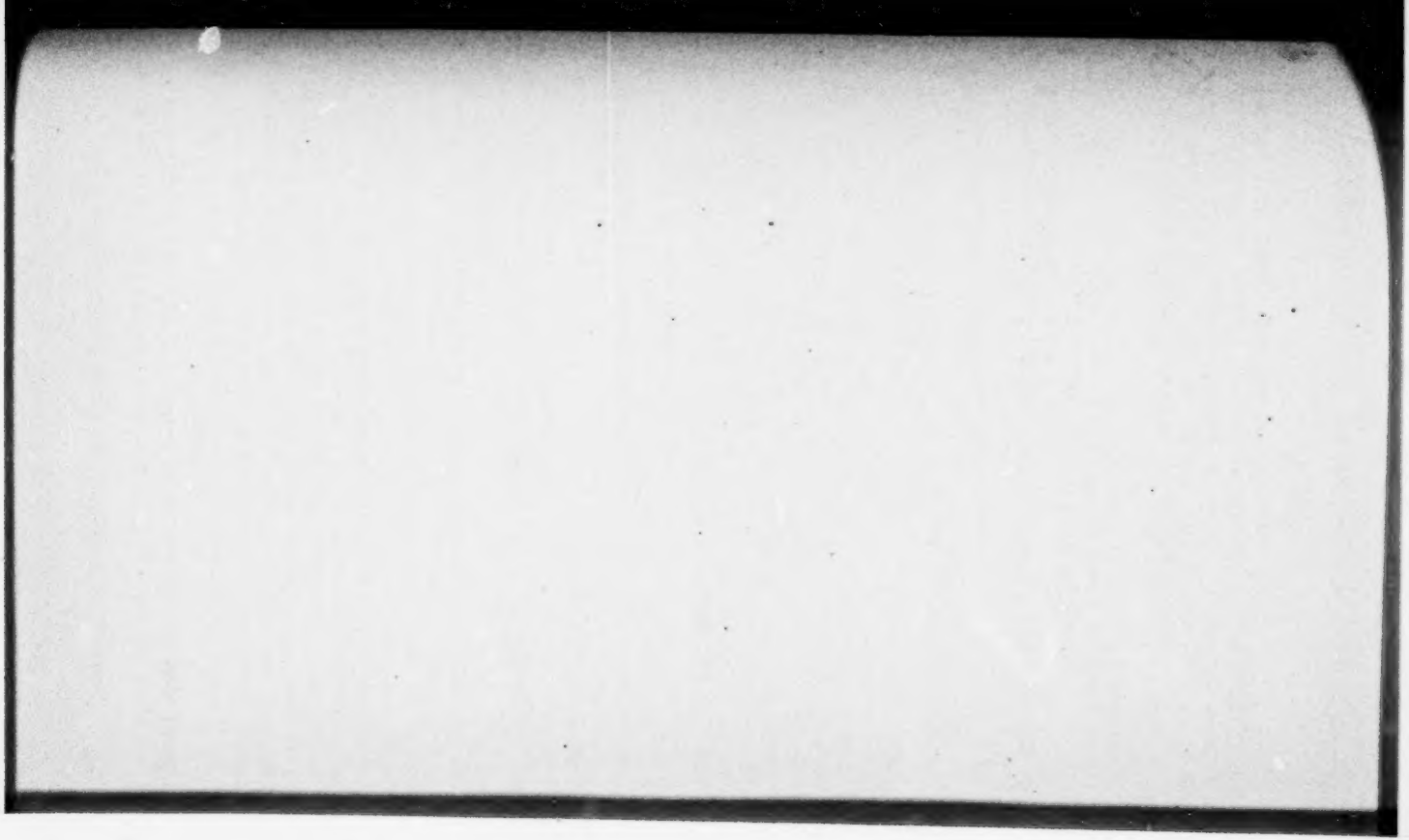
Dated this 25th day of Sept., 1906.

Due service of the foregoing citation admitted this 25th day of Sept. A. D. 1906.

WILLIAM G. WHEELER,
United States Attorney,
Western District of Wisconsin.

[Endorsed:] Filed Sep. 26 1906 F. W. Oakley, clerk.

Endorsed on cover: File No. 20,420. W. Wisconsin C. C. U. S. Term No. 132. Antoine G. Starr, an infant, by his guardian, A. Pearce Tomkins, plaintiff in error, *vs.* Samuel W. Campbell. Filed October 15th, 1906. File No. 20,420.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 132.

ANTOINE G. STARR, AN INFANT, BY HIS GUARDIAN, A. PEARCE TOMKINS, PLAINTIFF IN ERROR,

vs.

SAMUEL W. CAMPBELL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

REPLY BRIEF OF PLAINTIFF IN ERROR.

The learned solicitor general, in his brief, apparently relies upon these two propositions:

1. That the citizenship of the plaintiff in error is immaterial.

2. That the restriction on alienation embraces the sale of standing timber.

It would seem that the Heff case is a complete answer to the first proposition, and the Paine Lumber Co. case to the second.

I.

Prior to the passage of the act of February 8, 1887 (24 Stat., 388) and the conferring of citizenship thereunder, "the recognized relation between the Government and the Indians was that of a superior and an inferior, whereby the latter was placed under the care and control of the former" (Choctaw Nation *v.* United States, 119 U. S., 1, 28).

Speaking of these non-citizen Indians, this court said in Lone Wolf *v.* Hitchcock, 187 U. S., 553, 567: "These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the States, and they receive from them no protection."

Under those circumstances, unquestionably the Government was the guardian of the person and estate of such Indians. The Department based its right to control the sale of the timber upon this relation of guardian and ward. As stated in our original brief, Secretary Bliss said: "The United States has no interest whatever in the lands nor in the timber except as the guardian of the Indians."

Prior to the decision of this court in the Heff case, the Department placed its right to control the sale of timber and its proceeds on the broad proposition that the Indians although citizens were still the wards of the Government and under Federal control.

This court in the Heff case holds and counsel for defendant and *amicus curiæ* concede, that the Indian allottees are emancipated from Federal control as to their civil and political rights and status.

It would seem to follow, that whatever control remains in the Department is by virtue of the condition contained in the patent and by that alone. We presume it will be admitted that the President conformed strictly to the terms of the treaty as to the form of the condition contained in these patents. This condition is simple, and speaks for itself.

2.

This brings us to the second proposition urged by counsel for defendant, that the restriction on alienation embraces the sale of the standing timber.

The decision of this court in the Paine Lumber Co. case, we submit, answers this question in favor of the plaintiff. It was there squarely held that the restraint upon the alienation of the land did not extend to a restraint upon the sale of the timber.

Counsel while criticizing the decision in that case concede that where the timber is cut and sold without the consent of the President, the United States cannot interfere and has no cause of action against the party receiving the timber. This is true, for as said by this court in Schrimpscher *v.* Stockton, *supra:* "a violation of the condition of the patent would not redound to the benefit of the United States, or enable it to repossess the lands."

The Indian patentee has the right to cut the timber and sell it, there is no restriction upon such use. The United States would have no title or interest in the logs or the lumber manufactured therefrom, or in the money derived from the sale thereof.

Counsel for defendant apparently attempt to draw a distinction between a case where the timber is cut and sold without the consent of the President and one where the sale is made with such consent. This we apprehend is a distinction without a difference.

The learned district judge who decided the demurrer in this case and rendered judgment against the plaintiff, later found himself confronted by this same distinction, and felt compelled to hold that "the Indian has simply undertaken to sell the timber without any right so to do, and the purchaser has taken it off and sold it to other persons. The sole right of action is in the Indian allottees. There seems to be nothing upon which a trust relation can be founded. The

late case of United States *v.* Paine Lumber Co., seems to be decisive of the questions here involved."

United States *v.* Auger *et al.*, 153 Fed., 671.

The Indian citizen does not draw such fine and technical distinctions. He will be satisfied to cut the timber himself, and then dispose of it and collect the proceeds himself, rather than to enter into a formal contract, approved by the President, in which case he will have doled out to him ten dollars or more a month as shall seem best to the local agent or some clerk in the Department.

Limitations and restrictions on the use of property are not favored, and although they will be enforced when the intent is clear, ordinarily all doubts will be resolved against them.

Wakefield *v.* Van Tassell, 95 Am. St. Rep., 207, note A, p. 214.

Klaer *v.* Ridgeway, 86 Pa. St., 529.

Dunbar *v.* Sticker, 45 Iowa, 384.

It is difficult to understand how a condition that the grantee shall not sell, lease or in any manner alienate the tract of land described, is violated by cutting and removing the timber standing thereon.

In the Paine Lumber Co. case it was urged that the title to the land was held in trust by the United States, and that as such trustee it should control the sale of the timber, but this court held that: "The land is not the land of the United States, and the timber when cut does not become the property of the United States." With much more force can that language be applied to the case at bar, where the legal title to the land and timber is unquestionably in the plaintiff.

This court, in the Paine Lumber Co. case, said: "The restraint upon alienation must not be exaggerated."

To say that the cutting and removal of the timber by the Indian is an alienation of the tract of land from which such timber is cut and removed, would certainly be a gross exaggeration. What the Indian can do himself, he can

certainly delegate the right to do to another, and in this case by a mere verbal license.

Much stress is placed by counsel for defendant upon the provision in the Dawes' act, that the citizenship conferred is "without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property."

Plaintiff does not claim that the condition against alienation is affected by citizenship. The condition does not provide for a guardianship, it simply restrains the grantee from alienating the tract of land without the consent of the President. When that consent is obtained the condition is terminated.

That the Department bases its claim to control the proceeds of the sales of timber upon the ground that the relation of guardian and ward still exists between the Government and the Indian citizen, is shown by the citation on page 18 of the brief of the learned solicitor general, from the report of Indian Agent Mercer in 1893. From that report it appears that the Department claimed the right to control the disposition of the dead and down timber on these allotments. This timber was certainly personal property and not a part of the land.

In reply to the contention of the counsel *amici curiæ*, that the Indian agent and not the guardian appointed under the State law has control of these funds of the minor we call attention to section 6 of the Dawes' act which provides: "That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside."

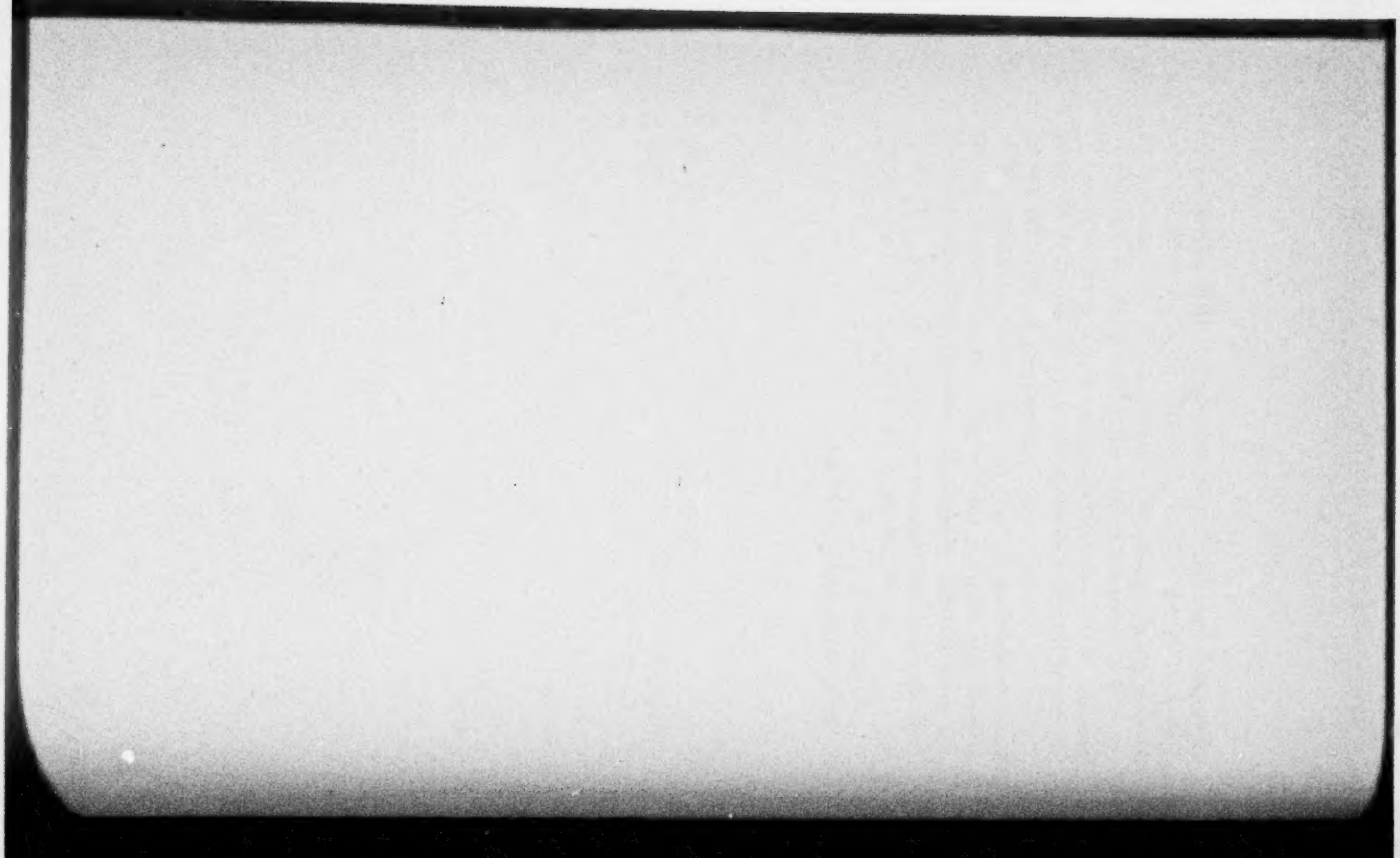
This would seem to be in conflict with the rule of the Interior Department that the Indian agent under the direction of the Commissioner shall control the funds of the minor and pay it out in such manner as to him shall seem proper.

If such conflict exists the rule of the Department must give way to the laws of the State.

As bearing upon this question we cite the case of Morrison *et al. v.* Burnette *et al.*, 154 Fed., 617, in which it is held that a regulation of the Interior Department is effective in so far as it is sustained by the acts of Congress, and is ineffectual so far as it is in conflict with them. This was said as to the approval of leases of allotments of Indian minors by the Secretary of the Interior.

We apprehend that under the laws of the State and the act of Congress the guardian of this plaintiff has the sole right to collect and disburse the money derived from the timber cut and removed from his land, whether such timber was lawfully or unlawfully taken therefrom.

W. M. TOMKINS,
Counsel for Plaintiff in Error.



SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1907.

No. 132.

ANTOINE G. STARR, AN INFANT, BY A. PEARCE TOMKINS, HIS GUARDIAN, PLAINTIFF IN ERROR,

vs.

SAMUEL W. CAMPBELL, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN

BRIEF FOR PLAINTIFF IN ERROR

STATEMENT OF CASE.

In Error to the Circuit Court of the United States for the Western District of Wisconsin to review a judgment sustaining a demurrer in an action by the plaintiff an Indian allottee to

recover certain moneys collected by the defendant who is Indian agent, for timber cut from plaintiff's allotment.

The complaint in substance alleges :

That the plaintiff is an infant and that A. Pearce Tomkins is his duly appointed general guardian and guardian ad litem ; that plaintiff is a Chippewa Indian of the Lake Superior, residing on the Bad River Indian Reservation in the State of Wisconsin, born within the jurisdiction of the United States of America, and that the President of the United States of America, in accordance with the provisions of the third article of a treaty concluded September 30th, 1854, with the Chippewa Indians of the Lake Superior and the Mississippi, approved the selection of said Antoine G. Starr, and assigned the same to him, being the West half of the Southeast quarter of Section four (4), Township forty-six (46), North of Range three (3) West of the fourth principal meridian in the State of Wisconsin, and that the third article of said treaty was in words and figures as follows :

"Article 3. The United States will define the boundaries of the reserved tracts, whenever it may be necessary, by actual survey, and the President may, from time to time, at his discretion, cause the whole to be surveyed, and may assign to each head of a family, or a single person over twenty-one years of age, eighty acres of land for his or their separate use ; and he may, at his discretion, as fast as the occupants become capable of transacting their own affairs, issue patents therefor to such occupants, with such restrictions of the power of alienation as he may see fit to impose. And he may also at his discretion, make rules and regulations respect-

ing the disposition of the lands in case of the death of the head of a family or single person occupying the same, or in case of its abandonment by them. And he may also assign other lands in exchange for mineral lands, if any such are found in the tracts herein set apart. And he may also make such changes in the boundaries of such reserved tracts or otherwise as shall be necessary to prevent interference with any vested rights. All necessary roads, highways and railroads, the lines of which may run through any of the reserved tracts, shall have the right of way through the same, compensation being made therefor as in other cases."

That by Act of Congress approved February 11th, 1901, the right to allotment was extended to all Indians then residing on the La Pointe or Bad River Reservation, in Wisconsin, irrespective of age and condition.

That pursuant to such selection and allotment, and on the 29th day of June, A. D. 1905, the President, by virtue of the power and authority conferred upon him by said treaty, issued and delivered to said Antoine G. Starr, a patent to said land, which patent did give and grant to said plaintiff the said tract of land, "to have and to hold the same, together with all the rights, privileges, immunities and appurtenances, of whatsoever nature thereunto belonging unto the said Antoine G. Starr, and to his heirs forever, provided as aforesaid, that Antoine G. Starr and his heirs shall not sell, lease, or in any manner alienate said tract without the consent of the President of the United States of America."

That said land exclusive of the merchantable timber standing thereon was then and now is of the value of One Thousand Dollars ($1000.00) and no more.

That on the 8th day of January, A. D. 1902, the said Antoine G. Starr signed his name to a certain written instrument, called a contract, by which he purported, with the approval of the President, to sell to Justus S. Stearns, under rules and regulations approved by the President of the United States, December 6th, 1893, which are hereto attached and made a part of this contract, the merchantable timber of the kinds therein specified, standing or fallen on the said land; the said Justis S. Stearns agreed to pay to the United States Indian Agent for the La Pointe Agency, in trust for said party of the first part, for all such timber cut upon the said described lands a specified sum per thousand feet.

The rules and regulations in so far as they are claimed by defendant to affect the issues in the case are as follows:

"Rule 7. After deducting one half of the cost of the scaling and other necessary expenses chargeable against the same, the proceeds of timber taken from the allotted lands of the reservation shall, after the deductions above stated, be deposited in some national bank subject to check of the Indian owner of the allotment, countersigned by the Indian Agent of the La Pointe Agency, unless otherwise stipulated in contracts with particular Indians."

"If the Indian Agent shall in any case be of the opinion that the allottee is not competent to manage his own affairs, he shall, subject to the approval of the Commissioner of Indian Affairs, have authority to fix the sum or sums, if any, such allottee shall be be permitted to withdraw from deposit."

That between the 27th day of January, 1902 and the 1st day of October, 1905, and prior to the commencement of this

action, the said Justus S. Stearns, named in said contract entered upon said land and cut and removed therefrom a large amount of standing timber of the value of at least Fifteen Thousand Dollars ($15,000.00), which amount was prior to the commencement of this action paid to the said defendant, S. W. Campbell, for the use and benefit of this plaintiff, that of said amount said Campbell has paid to said plaintiff the sum of Three Thousand One Hundred Dollars ($3,100.00) and no more, and there is still in said Campbell's possession the sum of Eleven Thousand Nine Hundred Dollars ($11,900.00) so received by him for this plaintiff.

That on the 4th day of October, 1905, and prior to the commencement of this action, the said A. Pearce Tomkins, as general guardian of the plaintiff, demanded of said defendant the said sum of Eleven Thousand Nine Hundred Dollars ($11,900.00), and requested said defendant to pay the same in cash, or to deposit the same in some National Bank, and countersign a check for said amount in favor of the plaintiff, but defendant then and there refused and still does refuse so to do, and announces that he will only pay to the plaintiff or his guardian the sum of Ten Dollars (10.00) per month, and claims the right to hold the said money and pay the same out as he may be directed to by the Commissioner of Indian Affairs.

That prior to the making of the order amending said rule number 7, it was and for many years had been the established custom and practice of the respective Indian Agents of the said La Pointe Agency, to pay to the allottees under such timber contracts, the amounts payable under such contracts

as fast as demanded by such allottees, such payments being left entirely to said Indian Agents, the Commissioner of Indian Affairs in no manner interfering with, or attempting to control such payments, and that it was the said S. W. Campbell, who was appointed as such Indian agent in July, A. D. 1898, who first adopted the rule and practice of limiting such payments to ten dollars per month, as he in his discretion thought best.

That the said S. W. Campbell gives as his reason for refusing to pay said money or countersign a check for the same, that he has received instructions from the Commissioner of Indian Affairs not to allow allotttees to draw more than ten dollars per month, under such contracts, unless otherwise directed by said Commissioner, while this plaintiff alleges that it does not fall within the scope of the authority of the Commissioner of Indian Affairs to interfere with the disposal of said money by the said Indian Agent, and no order given by said Commissioner can justify said Indian Agent in his refusal to pay said money to this plaintiff, or to countersign a check in his favor therefor, but that said general guardian so appointed under the laws of the State of Wisconsin is the proper party to determine how much shall be paid to and expended for this plaintiff.

That by reason of said failure and refusal of the said defendant to pay said money or to countersign a check therefor in favor of this plaintiff, the plaintiff is damaged in the sum of Eleven Thousand Nine Hundred Dollars ($11,900.00).

WHEREFORE the plaintiff demands judgment against the said defendant for the sum of Eleven Thousand Nine

Hundred Dollars ($11,900.09) damages with interest from October 4th, 1905, together with the costs of the action.

The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action.

The court below sustained the demurrer, and the plaintiff standing upon his demurrer, entered judgment dismissing the action with costs. The court below made and filed the folowing decision :

"The treaty with the Chippewa Indians of Lake Superior and the Mississippi, of September 30th, 1854, contains the following provision :

'The President may, from time to time, at his discretion, cause the whole to be surveyed, and may assign to each head of a family or single person over twenty-one years of age eighty acres of land for his or their separate use ; and he may, at his discretion, as fast as the occupants become capable of transacting their own affairs, issue patents therefor to such occupants, with such restrictions of the power of alienation as he may see fit to impose. And he may also, at his discretion, make rules and regulations respecting the disposition of the lands in case of the death of the head of a family or single person occupying the same, or in case of its abandonment by them. And he may also assign other lands in exchange for mineral lands, if any such are found in the tracts herein set apart'.

By virtue of this provision the President has made rules and regulations concerning the alienation or sale of the stand-

ing timber upon the tracts mentioned in the complaint, and from such sale the moneys claimed by the plaintiff were derived. In view of the power given to the President by the treaty, and the execution of such power by him through such rules and regulations, I think that the money claimed by the plaintiff is within the control of the Interior Department, and is held in trust by the United States for the plaintiff's benefit; and that the demurrer interposed to the complaint should be sustained."

ERRORS RELIED UPON.

The Court below erred:

1. In sustaining the demurrer to the complaint.

2. In entering judgment in favor of the defendant.

3. In refusing to enter judgment for the plaintiff as prayed for in the complaint.

BRIEF OF ARGUMENT.

The first question which naturally presents itself, is as to the jurisdiction of this court on writ of error to the Circuit Court.

The plaintiff's right to recover in this action depends upon the construction of Article 3 of the Treaty of September 30th, 1854, between the United States and the Chippewa Indians of Lake Superior and the Mississippi.

It is true a patent has been issued by the President of the

United States to the plaintiff, which contains only the simple restriction upon alienation, that the grantee shall not sell, lease or in any manner alienate the tract of land conveyed, without the consent of the President. But the patent is not conclusive, except in so far as it conforms to the treaty, in fact is of no effect if in conflict with the treaty.

Ladiga v. Roland, 43 U. S. 591,
Jones v. Meehan, 175 U. S. 21,
Chamberlain v. Marshal, 8 Fed. 409.

In Pickering vs. Lomax, 145 U. S. 591, the treaty and the patent issued under it, were nearly identical with those in the case at bar, A question was raised in that case as to the jurisdiction of the Supreme Court.

It was held that the proviso in the treaty continued to be operative, so long as the land was owned by the grantees or their heirs, and that the object of carrying the proviso into the patent was to apprise intending purchasers of the restrictions imposed upon the alienation of the lands, and that this court had jurisdiction.

The rights of the Indians to these lands are based upon the Treaty of Sept. 30th, 1854.

The defendant contended in the court below, that by the treaty there were restrictions placed upon alienation, and a certain control retained over the allottee, and his allotment, not found in the patent.

As we read the treaty a large discretion was given to the president as to what restriction on alienation, if any, should be put into the patent.

If he had thought the particular allottee capable of transacting his own affairs and caring for himself, and especially if the allottee was to become a citizen, he might issue a patent without any restriction upon alienation. He was empowered by the treaty to issue patents "with such restrictions of the power of alienation as he might see fit to impose."

He did issue a patent to the plaintiff and his heirs, "with all the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging." The only restriction in the patent being that said "Antoine G. Starr and his heirs shall not sell, lease, or in any manner alienate said tract without the consent of the President of the United States of America."

The defendant relied, in this contention, upon the following language in the treaty, "and he (the president) may also in his discretion, make rules and regulations respecting the disposition of the land in case of the death of the head of the family or single person occupying the same, or in case of its abandonment by them."

A conclusive answer to this contention is, we think,—

1. No such contingency has arisen in this case.

2. A fair construction of this provision would seem to be, that it had reference solely to allotments before patent, and while the legal title was still in the United States.

3. The president in the patent has provided that the land shall go to the heirs of the allottee.

The same is true as to the provision in the treaty that "he (the president) may also assign other lands in exchange

for mineral lands, if any such are found in the tracts herein set apart."

This must refer to allotments prior to patent. To hold otherwise would give the president the power to cancel a patent and assign another tract of land, after such patent has issued, and the land had been sold and conveyed to a third party with the president's consent.

A treaty should be construed not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.

Jones vs. Meehan, 175 U. S. 21.

The learned Judge in the court below, seems to have followed the construction of the treaty contended for by the defendant, for in his opinion he says "In view of the power given to the President by the treaty and the execution of such power by him through such rules and regulations, I think that the money claimed by the plaintiff is within the control of the Indian Department, and is held in trust by the United States for the plaintiff's benefit; and that the demurrer to the complaint should be sustained."

It seems clear then that the construction of this treaty is in drawn question in this case, and it is properly taken to this Court.

Ornelas vs. Ruiz, 161 U. S. 502.

The court having acquired jurisdiction of this case because the construction of the treaty is drawn in question, has the power to dispose of the entire case, including all questions, whether of jurisdiction or of merits.

Chappell v. United States, 160 U. S. 499.

The controversy involved in this case necessarily calls for the construction of the treaty relied upon by claimant, the writ of error, therefore, is properly direct from the Supreme Court of the United States to the Circuit Court.

Mitchell v. Furman, 180 U. S. 402.

2.

As in the case lately decided in this court, of United States v. Paine Lumber Co. (206 U. S. 467) the primary issue seems to be, whether the Indian allottees under the Chippewa Treaty of 1854 are vested with sufficient title in their allottments to authoize the sale by them of their standing timber, without the approval of the President.

In that case the title was held by the United States in trust for the allottees and their heirs.

In this case the United States has parted with legal title by a patent in the usual form, except that it contains a restriction, that the grantee shall not sell, lease or in any manner alienate the tract of land without the consent of the President.

The rule is well established in this court that such a patent conveys the title in fee simple to the grantee.

Libby v. Clark, 118 U. S. 250.
Schrimpscher v. Stockton, 183 U. S. 290.
Lykins v. McGrath, 184 U. S. 169.
United States v. Paine Lumber Co., supra.

In Schrimpscher v. Stockton, supra, Mr. Justice Brown, speaking for the court says :

"Here the United States had issued a patent to Rodgers "and to his heirs and assigns forever," subject to a condition, not that the title should ever revert to the United States, but that he should not alienate the lands without the consent of the Secretary of the Interior. The government thus passed all its title to the land in fee simple, and a violation of the condition of the patent would not rebound to the benefit of the United States, or enable it to repossess the lands, but was simply intended to protect the grantee himself against his own improvident acts, and to declare that the title should remain in him, notwithstanding any alienation that he might make."

It is suggested that the case of United States v. Paine Lumber Co. supra, simply holds that the allottee has the right to cut the timber himself and sell the logs, that standing timber is a part of the realty and cannot be sold by the allottee without the consent of the President.

The restriction in the patent is simply upon the alienation of the 'tract of land.' By the terms of the treaty the land is assigned to the allottee for his separate use. As suggested in the case of United States v. Paine Lumber Co. it is difficult to understand how the allottee can use timber land if he cannot dispose of the timber.

Again what the allottee can himself do, he can also do by an agent. If he has the right to cut the timber himself he can certainly authorize another to cut it for him.

While it is true that under the statute of frauds the sale of standing timber must be in writing, it is equally true that a parol license is good until revoked, and one cutting under such license is not a trespasser, and gets good title to all timber cut and removed before the license is revoked.

Keystone Lumber Co. v. Kolman, 94 Wis. 465.
Giles v. Simonds (Mass.) 77 Am. Dec. 373 and note.

3.

The sale of the standing timber in this case was consented to by the President.

"The land is not the land of the United States, and the timber when cut did not become the property of the United States." United States v. Paine Lumber Company, supra. Certainly the proceeds of the sale of the timber did not become the property of the United States.

When consent to alienation is given, the President's authority over the matter is ended. Permission once given cannot be revoked. Doe v. Beardsley, 2 McLean 412. Limitations and restrictions on the use of property are not favored, and although they will be enforced when the intent is clear, ordinarily all doubts will be resolved against them. Wakefield v. Van Tassell, 95 Am. St. Rep. 267 Note A, page 214. The consent of the President is no formal proceeding it is a mere matter of permission.

In Lomax v. Pickering, 173 U. S. 26, the court said:

"The approval of the President was no proper part of

the deed. How that permission should be obtained or expressed is left undetermined by the proviso. We see no reason why it might not have been a memorandum at the foot of the petition for approval, or even a letter to that effect. The essential fact was that permission should be obtained and expressed in some form, of which, in all probability, a record was kept in the Department."

Under this restriction upon alienation as construed by it under the treaty, the Interior Department has assumed the widest authority over the Indian allottees, even the most 'liberal constructionist' is left far behind. A strong illustration of this is found in the case of the Red Cliff Indian Reservation adjoining the reservation on which the allotment in question is situated.

On the Red Cliff reservation all the lands were allotted and patented to the individual Indians on or before May 8th, 1897 and all the Indians on that reservation became citizens prior to that date.

Based upon the power supposed to be concealed in the patent construed in the light of the treaty, the Indian Department has kept governmental control of these Indian citizens the same as if they were blanket Indians of the Far West.

There are employed and sustained by the United States, a physician who looks after the sick on the reservation, an Indian farmer whose duties are to look after the Indians and attend to their money matters, to look after the timber on the allotted lands, see that it is properly cut and scaled and accounted for by the contractor, and generally to have immedi-

ate charge of the Indians on the said Red Cliff reservation and their property, also a teacher and housekeeper employed in conducting a day school for the education and instruction in the common branches and domestic economy of the Indian children, also a policeman, whose duties under the direction of the Indian farmer are to preserve order on the reservation.

And still the wonder grows that one small proviso can contain it all.

A conflict of jurisdiction has already arisen between the Indian policeman and the town constable, and the local state court has mulcted one poor Indian policeman in substantial damages for false imprisonment for enforcing order upon the so called reservation.

This court has repeatedly held that where the United States conveyed property to an Indian absolutely, that is without any condition or restriction on its alienation, he could dispose of the same at his pleasure and give good title to his grantee.

United States v. Ritchie, 17 How. 525.
Mann v. Wilson, 23 How. 457.
Crews v. Burchman, 1 Black 352.
Wilson v. Wall, 6 Wall. 83.
Pennock v. Commrs, 103 U. S. 44.
Elwood v. Flannigan, 104 U. S. 563.
Jones v. Meehan, 175 U. S. 1.

It should be kept in mind, that the patent in this case is not one of the so called *trust* patents, provided for in the Act of Congress of Feb. 8th, 1887 commonly known as the 'Dawes' Act.'

In that case the United States retains the legal title, and is the trustee with the rights of such trustee to the trust property in whatever form it may be found.

Here the patent conveys to the Indian the absolute title in fee subject only to the restriction upon alienation.

It is very much exaggerating this restriction upon alienation to read into it the right of the government to control the grantee in the use of such allotment, or the timber standing thereon, or the money derived from the sale of the land, the standing timber or the crops.

This would seem to be a self enforcing condition like the statute of Wisconsin which provides that no mortgage or other alienation by a married man of his homestead, exempt by law from execution, or any interest therein, legal or equitable, present or future, by deed or otherwise, without his wife's consent, evidenced by her act of joining in the deed, mortgage or other conveyance, shall be valid or of any effect whatever." R. S. of Wis. Sec. 2203 as amended by Chap. 45 Laws of Wis. for 1905.

Of like nature is the provision of the Statutes of the United States that a governmental homestead is not liable to sale on execution for debts contracted prior to the issue of the patent.

The only persons who can take advantage of these laws, are those for whose benefit they were passed or their privies.

The contention that the restraint on alienation attaches to the property no matter what form it may take, is without foundation in law or in fact.

The restriction does not reach the timber. One person may own the 'Tract of land', another the standing timber. It would be precisely correct to say that A owned the tract of land and B the timber standing upon it, C having sold the standing timber to B and the tract of land to A.

The allottee is entitled to the separate use of the allotment, and it is difficult to understand how land covered with heavy pine timber can be used except by the cutting and sale of the timber.

It is urged in support of this contention that the law of trusts applies and that the purpose which the government had in mind at the time this restriction was adopted, was to authorize departmental control of the timber and its proceeds.

We fail to find any element of trust retained by these patents. This court in the cases cited, seems to have disposed of this claim, by holding that when the conveyance was approved by the President "it was a determination *that the purposes for which the restriction was imposed had been fully satisfied.*"

The purpose which the government had in mine when the restriction was designed, related to Indians not citizens, and who were still the wards of the government. This relation has been terminated by the Dawes' Act, these allottees are now full fledged citizens of the United States and of the state in which they reside.

This very treaty provides that the patent is to be issued only in case the President finds that the allottees have "become capable of transacting their own affairs." The Presi-

dent by issuing the patent has stamped his approval upon the citizenship conferred upon the allottee.

4.

An examination of the records of the Indian office will show that the Interior Department has based its right to control the timber and its proceeds upon the relation of guardian and ward claimed to exist between the government and the Indian, and the necessity of superintending his weakness and protecting him from imposition.

This idea is expressed by a departmental letter written by acting Commissioner Thos. P. Smith and approved by Secretary Bliss as early as April 19th, 1897 in which it is said:

"The United States has no interest whatever in the lands nor in the timber *except as the guardian of the Indians*, and therefore, the Act of Feb. 16th, 1889 (25 Stats. 673, which authorizes the President to permit Indians residing on reservations or allotments *the fee to which* is in the United States (to dispose of dead timber) would not apply to these allotments."

"Regarding the suggestion 'whether it would not be better to require the purchase money to be paid into the Treasury and then paid out to the Indians to whom it belongs respectively,' I have the honor to say that inasmuch as *these moneys when received will belong to the individual allottees and can in no way become the property of the United States*, I doubt whether it would be expedient or proper to turn them into the Treasury."

And these moneys always have been and now are held by the local Indian Agent or deposited in some local bank subject to the check of the Indian countersigned by such agent.

In case of loss through the failure or dishonesty of the agent or bank, it will not be claimed, we apprehend, that the United States would be responsible to the allottee for such loss.

As said in the case of United States vs. Paine Lumber Co. supra, upon this claim of governmental superintendence of the Indian allottee, "The argument proves too much." In re Heff 197 U. S. 488 it is held that such allottee ceases to be a ward of the government and is released from Federal control.

Whatever control there is must be found in the language of the restriction itself.

The case of United States vs. Rickert 188 U. S. 432 has been urged in support of this claim of guardianship and trust relation.

As stated before that case is based upon the ground that under the particular form of patent issued to the allottee in that case, the legal title remained in the United States which was trustee with all the rights and powers of a trustee. Such is not the case here.

The case of Tomkins vs. Campbell, 129 U. S. 93 is relied upon by counsel for defendant as supporting his contention.

With all due deference to that learned court we believe

its decision to be out of harmony with the decisions of the Supreme Court of the United States.

Winslow, J. delivering the opinion of the court says :

"There is clearly no reason why the Indian should be prevented from selling or alienating his land, and should be given free disposal of the moneys arising from the sale of the timber thereon, which doubtless constituted the principal part of its value. On the contrary, there is every reason why there should be substantially the same restrictions upon the disposal of his money as upon the disposal of his land."

Granting that the *reasons* for restricting the sale of the land apply with equal force to sale of the timber and the disposition of the proceeds, this is not the question. It is not whether the same reasons should lead the United States to keep control of the proceeds, but whether it has done so. We contend, as held by this court in United States vs. Paine Lumber Co. that the condition in restraint of the alienation of the tract of land, does not reach the timber or give the President control of the proceeds.

We apprehend that a hesitation to interfer with the United States government in its control of the Indians, accounts largely for this decision of the Wisconsin court.

5

It was also urged by counsel for defendant in the court below, that under the terms of the contract itself, the local Indian Agent is made trustee of the proceeds, with the right

to control such moneys, and pay them out as he shall in his discretion deem best for the allottees.

In the first place the plaintiff is a minor, and no guardian had been appointed or acted on his behalf in the making of the contract in question. While the present guardian may waive the tort and sue in assumpsit on an implied contract to pay for the timber cut and removed, and against the Indian Agent on the case as for money had and received, it does not bind such guardian to give up the control of the funds of his ward and allow such agent to usurp the authority and rights of such guardian.

The plaintiff being a minor, the alleged contract between him and Justus S. Stearns is voidable and the plaintiff might recover by an action in trespass or conversion.

Tucker v. Moreland, 10 Pet. 58.
MacGreal v. Taylor, 167 U. S. 700.

He may waive the tort and sue in assumpsit.

15 Am, Eng. Encyc. of Law 1112 (2),
Keener Quasi Contracts, 159.

May vs. LeClaire, 11 Wall. 217.

Where the money the proceeds of the sale of the converted property belonging to plaintiff has gone into the hands of a third party with notice, the plaintiff may waive the tort and recover the proceeds of the sale from such third party.

Keener Quasi Contract, p. 170 et seq.
Thatcher v. Pray, 113 Mass. 291,
Bayne v. United States, 93 U. S. 642,
U nited States vs. State Bank, 96 U. S. 30."

The contract provides "that the money shall be paid to the United States Indian Agent for the La Pointe Agency, in trust for the said party of the first part (allottee)."

Does this contract creat a truste in the technical sense of the term?

In the general and popular use of the word it covers many things besides the legel and technical term trust. Money paid to an agent or other person for the use of another is in trust, but technically a trust is only created when the legal title is in the trustee, and the equitable title in the beneficiary. Davies vs. Davies, 109 Wis. 129.

Every trustee is an agent but every agent is not a trustee.

In the case at bar, it would seem that Campell was simply an agent to collect the money, deposit it in the bank, and countersign the checks.

In the contract in question in this case, no other duty or discretion is vested in the agent.

The only duty required of the Indian Agent after the money is deposited in the National Bank is to countersign the check.

The Indian being a citizen of the United States is competent to take hold and convey real and other property, the same as any other citizen of the Republic. United States vs. Ritchie, 58 U. S. 525.

It would not be claimed in case of a white citizen, that if such a provision as the one herein, viz: That the money should be deposited by Campbell in some National Bank sub-

ject to the check of the White citizen, countersigned by Campbell, he could refuse to countersign for the reason that he was of the opinion that the white citizen was not competent to manage his own affairs. The State has provided a way to appoint guardians for the estates of spendthrifts, and neither the Indian Agent nor the United States itself, can take the right away from the State or interfer with it.

In Hitchcock vs. United States, 22 App. D. C. 275 it was held mandamus will not lie to compel the Secretary of the Interior and Commissioner of Indian Affairs to direct an Indian Agent, a subordinate official, to perform a mere ministerial duty, such af countersigning a check. If the duty be a mere ministerial one, no order of the Secretary or Commissioner could be a justification for refusal on the part of the subordinate to perform it.

It is true the Supreme Court of the State of Wisconsin in the case before cited further says:

"In view of these considerations, what is the natural meaning of the provisions of the contract, that the money for the timber is to be paid to the Indian Agent in trust for the Indian, and that it is to be deposited in bank by him subject to the check of the Indian countersigned by the agent? To our minds these provisions cannot be construed as meaning that the government intended to abolish the safeguards which it erected to guard against the Indian's improvidence, but rather that it intended to place the proceeds of the land practically in the same position as the land itself, namely, subject to disposition only by the Indian when such disposition is approved by the government acting through its Indian Agent, instead of through the President."

This may be the true meaning of the contract, but we contend that the Indian Department had no authority to enter into or become a party to such a contract.

That the Indian allottee has the right to sell his timber without the consent of the President, and that if such consent were necessary, when given the control of the President ceases.

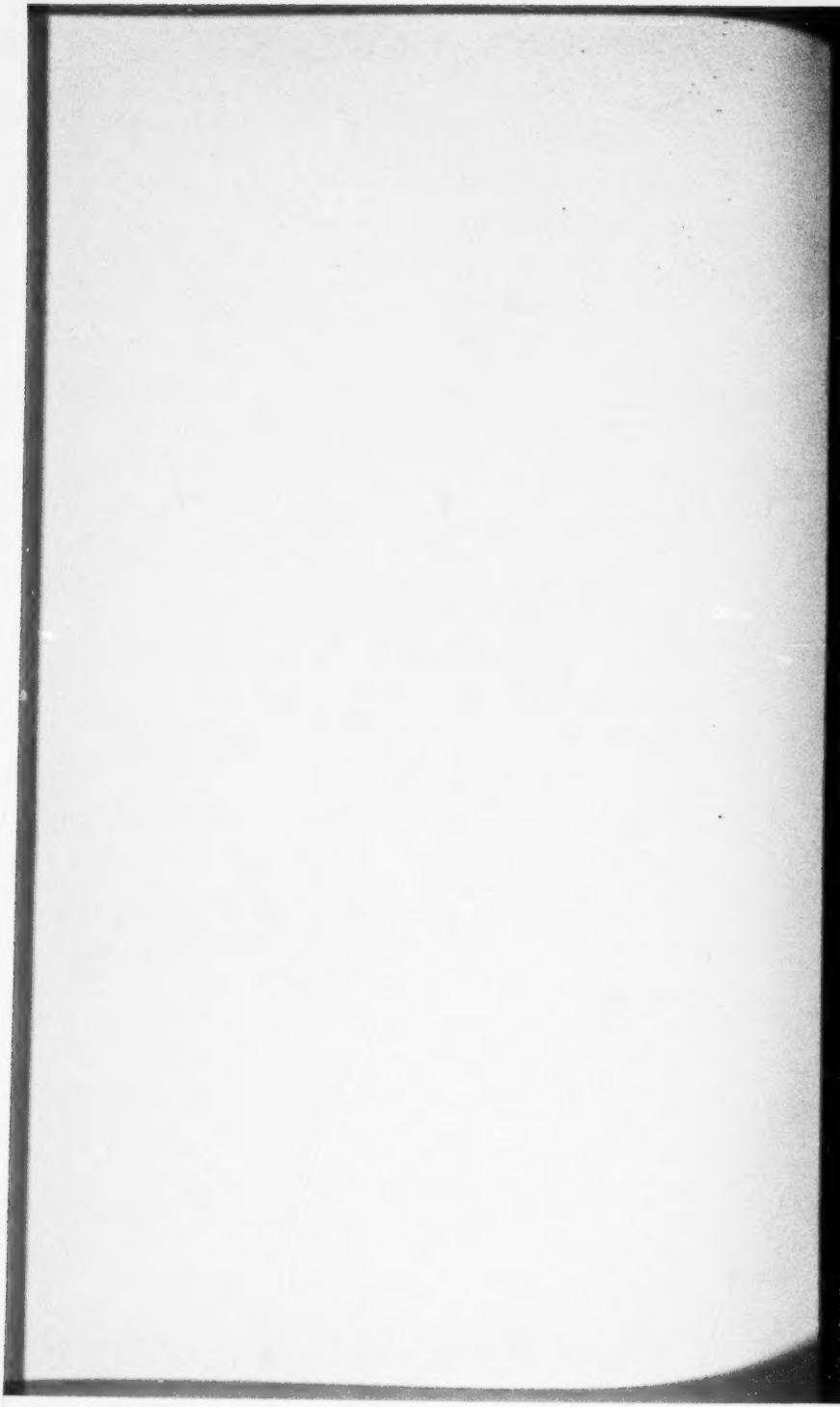
We fail to understand how one can read into this simple proviso so wide a control for the Interior Department. The power of consent is lodged in the President not in the Department.

If the door of consent of the President opens for the entrance of governmental control of the land, the timber, and the proceeds of the sale of both or either, it must be based on the relation of guardian and ward and as suggested in United States vs. Paine Lumber Co. what would be the limits of such control.

Having given the Indian allottee the privileges of citizenship he must assume its burdens and responsibilities, and we doubt not, the sooner this is done the better for all concerned. The present system of citizenship with a string to it, is demoralizing to the Indian citizen, who resents class legislation fully as much as his white brother.

The plaintiff in error, we respectfully submit, should have judgment as prayed for in his complaint.

W. M. TOMKINS,
Counsel for Plaintiff in Error.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907

No. 132

ANTOINE G. STARR, AN INFANT, BY A. PEARCE TOMKINS, HIS GUARDIAN, PLAINTIFF IN ERROR,

vs.

SAMUEL W. CAMPBELL, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR

Since the original brief in this cause was prepared and filed, this court has decided the case of Wm. Couture vs. United States No. 42, October, 1907 term, Nov. 11th, 1907.

Local counsel for the defendant herein, claim that the case of Couture vs. United States supra is conclusive in this, and that this court in citing in that decision the case of United States vs. Rickert, 188 U. S., 432, and McKay vs. Kalyton, 204 U. S., 458, has in effect held that by the condition against alienation contained in the patents issued under the treaty of Sept. 30th, 1854, the United States retains the same title and control over the lands patented as under the declaration of trust "improperly called a patent" issued pursuant to the Act of Congress of Feb. 8th, 1887, (24 Stats. at Large, 388, 389, 390.) It may be well here to call the attention of this court to the plain distinction it has drawn between these two classes of instruments.

In United States vs. Rickert and McKay vs. Klayton the decisions are based squarely upon the ground that the United States was the legal owner of the land and a trustee of the Indian.

Both cases cite the language ot the Attorney General "that the lands covered by the act are held by the United States for the period of twenty-five years in trust for the Indians, such trust being an agency for the exercise of a Federal power."

In both cases this court says, "the United States retained the legal title."

In United States vs. Rickert it is said "The patents here referred to (although that word has various meanings) were, as the statute plainly imports, nothing more than instruments or memoranda in writing, designed to show that for a period of twenty-five years the United States would hold

the land allotted, in trust for the sole use and benefit of the allottee."

On the other hand, commencing with the decision in Libby vs. Clark, 118 U. S. 250, it has been uniformly held by this court that "An estate in fee simple is where a man has an estate in lands or tenements, to him and his heirs forever", and that a limitation of the power of sale, is not inconsistent with a fee simple estate.

Schreimpscher vs. Stockton, 183 U. S. 290.
Lykins vs. McGrath, 184 U. S. 169.
United States vs. Paine Lumber Co., 206 U. S. 467.

In Schrimpscher vs. Stockton it is held, "The government thus passed all its title to the land in fee simple, and a violation of the conditions of the patent would not redound to the benefit of the United States, or enable it to repossess the lands, but was simply intended to protect the grantee himself against his own improvident acts, and to declare that the title should remain in him, notwithstanding any alienation that he might make."

In United States vs. Paine Lumber Company it is said, "The restraint upon alienation must not be exaggerated. It does not of itself debase the right below a fee simple."

Under the so-called trust patent the United States being the owner of the legal title in case of a cutting and taking of the timber without its consent, might maintain trespass or trover, or enjoin the waste.

Johnson vs. McIntosh, 8 Wheat. 574.

But under a patent containing a condition against alienation without the consent of the President, a cutting or removal of the timber would give the United States no right of action.

United States vs. Loughrey, 172 U. S. 206.
United States vs. Paine Lumber Co. supra.

United States vs. Jos. Auger et al 153 Fed. 671 in this last case which arose out of alleged trespass upon allotments on the Bad River Reservation, Sanborn D. J. says:

"The sole right of action is in the Indian allottees."

"The restraint upon the alienation of the tract of land does not extend to a restraint upon the sale of the timber. The land is not the land of the United States, and the timber when cut does not become the property of the United States, and certainly the money derived from the sale of such timber does not become the money of the United States.

United States vs. Paine Lumber Co. supra.

Under the trust patent the title to the land, the timber and the money is in the United States. Under a patent in fee with a simple restraint on alienation the title to the land, timber and money is in the Indian grantee.

Congress recognized this to be the case by providing by Act of Congress of Feb. 16, 1889, (25 Stats. 673) which authorizes the President to permit the Indians residing on allotments the fee to which is in the United States to cut dead and down timber.

It will not be contended we presume that the title to the dead and down timber upon the lands covered by these conditional patents is not in the Indian grantee. If so he can

certainly use and dispose of the same without even the consent of the President.

If the consent of the President were necessary to the validity of a sale, when that consent is given his authority over the matter is ended.

Doe vs. Beardsely, 2 McLean 412.

Such consent is a determination by him that the purposes for which the restriction was imposed has been fully satisfied.

Lykins vs. McGrath supra.

Bearing upon the rule that the consent exhausts the power of the President in the premises we cite Pickering vs. Lomax, 145 U. S. 310 and Lomax vs. Pickering, 173 U. S. 26.

If this were an action in trespass, we apprehend it would be admitted that the guardian would be the proper party to bring an action, the title to the timber being in his ward.

In such case it would seem clear that the guardian and not the Indian agent would be entitled to the control of the money recovered.

In case of an adult Indian who should recover for trespass upon his land under this form of patent, it would not be contended that he must turn over the money recovered to the Indian Agent.

This action is in effect an action to recover for money paid to the agent on a trespass. The so called contract was signed by the minor plaintiff. He by his guardian might recover from the party who cut the timber in trespass and his

guardian control the money so recovered. It will not be claimed we presume that the form of action would defeat the right of the guardian to the money.

It is conceded by the department that the money belongs to the Indian. By what right does the Indian Agent claim the right to retain it? Is it as trustee or legal owner?

The money is in the bank in tha name of the Indian who is the legal owner. It would seem to be a great exaggeration of the condition against the alienation of the tract of land contained in the patent, to say that this gave the United States the control of money derived from a sale of the timber cut from such tract. As well might it be claimed that the United States should collect and control the money derived from a sale of the crops raised on such tract of land.

As was said in United States vs. Paine Lumber Co. supra the treaty contemplated that the Indian would settle upon and improve the allotment, and that to do this the timber must be cut for clearing the land.

It would seem that a fair construction of the treaty and Acts of Congress amendatory thereof shows that the allotments were made to the Indians for the purposes of a home and for cultivation, and for their separate use and benefit, and that the condition against alienation of the 'tract of land' was "simply intended to protect the grantee himself against his own improvident acts, and to declare that the title should remain in him, notwithstanding any alienation that he might make."

Schrimpscher vs. Stockton, supra.

In re Heff 197 U. S. 488, it is announced that the Indian allottee is a full citizen and no longer a ward of the government as to his political status and rights.

In the same case the rule is re-asserted that there can be no divided authority over the property of the Indian.

That is the Indian citizen stands upon the same footing as to his personal and property rights as a white citizen, and that a condition in the title to property of the former has the same force and no more as such condition would have as to the title of the latter.

On the argument in the court below great stress was laid upon the "unwise policy" of paying the Indians their money as fast as it became due and they demanded it.

The present policy is as demoralizing as any that can be imagined. The money is doled out at $10.00 per head, and the Indians, like ordinary white men would do under the same circumstances, try to eke out a living on this amount, and spend most of their time in devising ways and means to get the rest of their money.

From 1881 when the first saw mill was built near the reservation for the purpose of buying and manufacturing this timber until about 1899, the Indians were practically paid their timber on demand, and those allottees started out for themselves and have not become a charge upon the public.

When the writer of this brief came to Ashland, adjoining the reservation the grandfathers of the present young men of that locality, were many of them in business and generally getting along well, no paupers among them, and apparently

much better able to manage their own affairs than are their grandsons.

It is hard for the present allottees whose timber is now being cut to understand why for fifteen years, at least, the allottees were paid in full as demanded while, now they must depend to a great extent upon the apparent whim of the Indian agent as to how much they shall receive.

It would be much better for the Indian to get his money, and such as are not capable of keeping it, spend it and get to work, for as the agent says in his report for 1906, these spendthrifts will not work at farming or improve their allotments so long as money is coming from their timber.

The Indian citizen rebels against the idea of being virtually the ward of the local Indian agent and being treated by him as a child.

The President by issuing the patent has found that the grantee has "become capable of transacting his own affairs." The United States by act of Congress has declared him a citizen with all the rights, privileges and responsibilities of such citizenship, thus declaring him capable of managing not only his own affairs but also those of his white fellow citizens, for in this very instance a large majority of the electors of the town are Indian allottees who decide who shall be the officers and for what amount and purposes taxes shall be levied in the town.

Yet the agent each month tells them they are not capable of managing more than $10.00 per month of the money received from a sale of their own timber.

W. M. TOMKINS,

Counsel for Plaintiff in Error.

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